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November 19, 2002
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: October 18, 2002

Case No.: TIA-0008

XXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for assistance in filing for state workers' compensation benefits for her late husband, XXXXXXXXXX (the worker). The Office of Worker Advocacy determined that the worker was not a DOE contractor employee and, therefore, was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the application should be remanded for further consideration.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. §§ 7384l(1). Part D of the Act provides a DOE program to assist "Department of Energy contractor employee[s]" in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o.

Pursuant to an Executive Order, DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department

of Energy facility." 66 Fed. Reg. 31,218 (June 11, 2001) (current list of facilities). 1/

This case concerns Part D of the Act, the portion of the Act that applies to DOE contractor employees. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852).

In her application for assistance, the applicant states that her late husband was an employee of Hardie Jamieson Trucking and Moab Truck Center, which had contracts with Union Carbide Corporation to haul uranium ore from various mining sites to milling sites. The application indicates that her husband later became ill with lung cancer and died.

The Office of Worker Advocacy determined that the applicant's late husband was not a DOE contractor employee. *See* September 11, 2002 Letter from the Office of Worker Advocacy to the applicant. Accordingly, the Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits.

In her appeal, the applicant states that her late husband should be considered a Department of Energy contractor employee. She argues that the uranium ore was mined and milled exclusively for the federal government at "federally controlled sites."

1/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2002), and a revised list in June 2001.

II. Analysis

A. Worker Programs

As an initial matter, we address the applicant's apparent confusion about the nature of the Part D assistance program. In the appeal, the applicant makes a statement which suggests that Part D provides for monetary compensation. Our review of other appeals confirms that some confusion exists among applicants about the various compensation and assistance programs. Accordingly, we address both the Part D assistance program and other worker programs.

As indicated above, Part D does not provide for monetary benefits. Instead, Part D is a program to assist workers in filing for state workers' compensation benefits. A decision that an applicant is not eligible for Part D assistance does not affect an applicant's right to file for state workers' compensation benefits. Similarly, a decision that the applicant is or is not eligible for Part D assistance does not affect whether the applicant is eligible for state worker's compensation benefits under applicable state law.

Moreover, a decision concerning an applicant's eligibility for Part D assistance does not affect any claim to federal monetary or medical benefits under other statutory provisions. The applicant in this case received an award under the Radiation Exposure Control Act (RECA), 42 U.S.C. 2210 note, and has applied for an additional $50,000 benefit under the provisions in Parts A through C of the EEOICPA, 42 U.S.C. § 7384u. The RECA and EEOICPA benefits for uranium workers are separate from Part D of the EEOICPA. Again, nothing in this decision - which concerns Part D of the EEOICPA - would affect the applicant's rights to those benefits.

With this clarification, we now turn to whether the applicant is eligible for Part D assistance.

B. Whether the Applicant is Eligible for Part D Assistance

The Office of Worker Advocacy determined that the applicant was not eligible for the assistance program because the applicant was the recipient of an award under the Radiation Exposure Control Act, 42 U.S.C. 2210. As explained below, we believe that the applicant's eligibility turns on whether the mining and milling sites at which her husband worked were DOE facilities within the meaning of the Act.

As indicated above, Part D applies to workers who fall within the definition of a "Department of Energy contractor employee." 42 U.S.C. § 7385o(b). In order to be a "Department of Energy contractor employee," a contractor employee must have worked at a "Department of Energy facility." 42 U.S.C. § 7384l(11); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). The term "Department of Energy contractor employee" is defined as:

> (A) An individual who is or was in residence at a Department of Energy facility as a researcher for one or more periods aggregating at least 24 months.
>
> (B) An individual who is or was employed at a Department of Energy facility by -
>
> > (i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or
> >
> > (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

42 U.S.C. § 7384l(11); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2) (emphasis added). A "Department of Energy facility" is defined as:

> [A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located -
>
> > (A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344, dated February 1, 1982 (42 U.S.C. 7158 note), pertaining to the Naval Nuclear Propulsion Program); and
> >
> > (B) with regard to which the Department of Energy has or had -
> >
> > > (i) a proprietary interest; or
> > >
> > > (ii) entered into a contract with an entity to provide management and operation, management and

> integration, environmental remediation services, construction or maintenance services.

42 U.S.C. § 7384l(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2) (emphasis added).

It is undisputed that the mining and milling sites at issue here are not on DOE's published list of facilities. For Colorado - the state at issue here - the DOE facilities consist of two DOE nuclear weapon explosion sites and the DOE Rocky Flats plant. 66 Fed. Reg. 31219. In fact, the DOE's list does not appear to contain any mining and milling sites for any states.

Although a facility is not on the DOE's published list of facilities, it may be covered by the Act. DOE's published list reflects the DOE's effort to identify all facilities covered by the Act. *See* 67 Fed. Reg. 31218-19. Accordingly, even though a facility is not on the list, it may fall within the Act's definition of a DOE facility. Accordingly, we turn to a consideration of whether the mining and milling sites at issue here fall within that definition.

If the mining and milling sites at issue in this application were privately operated, they are not DOE facilities. It is clear that privately operating mining and milling sites do not fall within the Act's definition of a "Department of Energy facility," because DOE did not have a "propriety interest" in such sites, and DOE did not contract for the "management and operation, management and integration, environmental remediation services, construction or maintenance" of those sites. *See* 42 U.S.C. § 7384l(12); 67 Fed. Reg. 82854 (to be codified at 10 C.F.R. § 852.2). Moreover, the fact that private mining and milling facilities do not fall within the Act's definition of a "Department of Energy facility" is consistent with Part A of the Act. Part A, which provides federal monetary and medical benefits to workers with certain illnesses, extends to employees of certain private employers, including uranium transporters. 42 U.S.C. § 7384u (uranium employees). *See also* 42 U.S.C. §§ 7384s, 7384l(4),(6),(7) (employees of "beryllium vendors" and of "atomic weapons employers"). Accordingly, the Act, as a whole, indicates that when Congress intended a provision to apply to employees of private employers who contributed to the nation's atomic weapons program, Congress so specified. That was not done with respect to Part D. Finally, it makes sense that Part D does not apply to employees of private firms, because DOE would not normally be involved in their state workers' compensations claims.

The determination at issue here does not specifically indicate whether the mining and milling sites at which the worker was employed were privately operated. It is our general understanding that the nation's uranium mines and mills were privately operated. It seems to us, however, that a determination that a uranium worker is not eligible for Part D assistance should specifically address the issue whether the mines or mills were privately operated. If all the nation's uranium mines and mills were privately operated, the determination should so state. If all the nation's uranium mines and mills were not privately operated, the determination should explain why the uranium mines and mills at issue in a given application would not fall within the definition of a DOE facility.

In this case, the determination did not address the nature of the mining and milling sites or whether they fall within the definition of a DOE facility. Accordingly, we have determined that it is appropriate to remand the application for such a determination.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0008 be, and hereby is, granted to the extent set forth in Paragraph 2 below.

(2) The application for assistance is remanded to the Office of Worker Advocacy for issuance of a more detailed determination concerning whether any of the mining and milling sites identified in the application meet the definition of a DOE facility.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 19, 2002